

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EARL WARREN)	
Claimant)	
VS.)	
)	Docket No. 250,975
EARTHGRAINS BAKING COMPANY)	
Respondent)	
AND)	
)	
ACE USA)	
Insurance Carrier)	

ORDER

Claimant appeals the November 29, 2001 Award of Administrative Law Judge Bruce E. Moore. The Administrative Law Judge determined that claimant had failed to sustain his burden of proof that exposure to protein spray at his employment caused permanent impairment of function for which an award of compensation should be issued. The Appeals Board (Board) held oral argument on June 14, 2002.

APPEARANCES

Claimant appeared by his attorney, Matthew L. Bretz of Hutchinson, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas C. Hobbs of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed. The Award sets out findings of fact and conclusions of law in some detail, and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own as if specifically set forth herein.

The Administrative Law Judge found the evidence provided by Kenneth A. Scheinberg, M.D., a specialist in otolaryngology, and the opinion of speech pathologist and audiologist Thumper Valancy Johnson, M.A., to be more persuasive than that of Carlos E. Garcia, M.D., also an otolaryngologist.

Both Dr. Scheinberg and Ms. Johnson had the opportunity to examine claimant more recently than Dr. Garcia. Additionally, Dr. Garcia was the one who referred claimant to Ms. Johnson for speech therapy. He did not examine claimant after claimant went through the treatments provided by Ms. Johnson.

The Board finds that the opinions of Dr. Scheinberg and Ms. Johnson, both of whom found no permanent impairment from claimant's exposure to protein spray at work, are the more persuasive. Claimant is entitled to no permanent impairment as a result of his exposure to the protein spray through a series of alleged accidents ending June 1997.

Claimant argued that respondent, in stipulating to accidental injury, was precluded from arguing that the accident did not cause claimant's disability. The Kansas Supreme Court in Webber v. Automotive Controls Corp., ___ Kan. ___, Syl. 2, 35 P.3d 788 (2001), held that "when only the nature and extent of disability is questioned by a respondent, it has not forfeited the right to claim that the accident which was admitted did not cause the disability which is claimed."

The Board, therefore, finds that respondent does have the right to contest whether claimant's condition is related to the admitted accident.

Claimant also argued that Ms. Johnson, a speech pathologist and audiologist, was not qualified to provide an opinion pursuant to the AMA Guides to the Evaluation of Permanent Impairment regarding what, if any, impairment claimant may have suffered.

Ms. Johnson accepted claimant as a client on referral from Dr. Garcia. She treated claimant for a substantial period of time, with claimant being returned to her on April 12, 2001, for an impairment evaluation at the request of the Administrative Law Judge.

Dr. Scheinberg acknowledged that a speech pathologist was competent to provide an evaluation pursuant to the AMA Guides.

In addition, K.S.A. 44-508(i), as amended July 1, 2000, defines health care provider as follows:

"Health care provider" means any person licensed, by the proper licensing authority of this state, another state or the District of Columbia, to practice medicine and surgery, osteopathy, chiropractic, dentistry, optometry, podiatry, **audiology** or psychology. (Emphasis added.)

An audiologist clearly falls within the definition of a health care provider.

K.S.A. 44-515 (Furse 1993) allows for examinations to be provided by health care providers in workers' compensation litigation. K.S.A. 44-515(e) (Furse 1993) states:

Any health care provider's opinion, whether the provider is a treating health care provider or is an examining health care provider, regarding a claimant's need for medical treatment, inability to work, prognosis, diagnosis and disability rating shall be considered and given appropriate weight by the trier of fact together with consideration of all other evidence.

The Board finds that the Kansas legislature has deemed audiologists to be qualified to provide impairment opinions on conditions within their area of expertise. Therefore, the opinion provided by Thumper Valancy Johnson, M.A., constitutes appropriate evidence which will be considered in this circumstance.

Based upon the evidence, the Board finds that claimant has failed to prove a causal relationship between claimant's vocal cord problems and his exposure to protein spray at work. Therefore, a permanent impairment of function for which an award of compensation can be issued must be denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated November 29, 2001, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation